TETAP TIARA SDN BHD v. HATCHING EDUCATION GROUP SDN BHD

HIGH COURT MALAYA, SHAH ALAM
CHOONG YEOW CHOY JC
[APPEAL NO: BA-12B-33-04-2023]
20 FEBRUARY 2024

Abstract – *A tenant who continues to occupy the tenanted premises with the knowledge that the landlord had breached of the provisions of the law, could not subsequently, having gained benefit from the breach, seek refund of the rentals paid. While the tenancy agreement may be null and void and thus unenforceable, the tenancy agreement per se was not illegal. The tenant must pay the rentals due while in occupation of the premises.*

CONTRACT: *Agreement – Tenancy agreement – Non-compliance with provisions of law by landlord – Deviation from original building plan without approval of local authority – Whether tenant entitled to terminate agreement – Whether continued occupation of premises and operation of business validated non-compliance with provisions of law – Whether agreement rendered null and void – Whether tenant could rely on deviation from original building plan to seek refund of rentals paid*

CONTRACT: *Agreement – Termination – Tenancy agreement – Non-compliance with provisions of law by landlord – Deviation from original building plan without approval of local authority – Whether tenant entitled to terminate agreement – Claim for restitution – Continued occupation of premises and operation of business – Whether tenant could claim restitution after having received advantage under agreement – Contracts Act 1950, s. 66*

The defendant ('appellant') and plaintiff ('respondent') entered into a tenancy agreement whereby the appellant agreed to rent two premises at its commercial project for three years, from 1 January 2018, to the respondent at a combined monthly rental of RM35,000. The respondent subsequently discovered that there were internal renovations done in the premises, which had deviated from the original building plan, without the approval from the local authority. Accordingly, the respondent was unable to apply for trade licenses to operate its business at the premises and thereby terminated the agreement on the grounds that the agreement was void for illegality and vacated the premises on 31 March 2019. On 15 March 2019, the respondent had filed a suit in the Sessions Court and sought, amongst others, a declaration that the agreement was null and void and refund of RM332,684.40 being the rental payments that had been made to the appellant for the premises. The appellant counterclaimed for RM262,959.17, being alleged outstanding rental and charges for the premises, and damages to be

A assessed by the court for loss of rental for the unexpired term of the tenancy and reinstatement cost. The Sessions Court Judge allowed the respondent's claims and dismissed the appellant's counterclaim. Hence, this appeal.

Held (allowing appeal in part):

B **(1)** The agreement between the parties had breached the various provisions of the law. The parties in a contract could not through an 'agreement' or a 'waiver' validate any non-compliance with the provisions of the law. The respondent became aware of the 'deviation' since April 2018 and continued to occupy the premises until March 2019 – running its business uninterrupted. However, the continued occupation of running C of the business did not detract from the fact that there were non-compliance/breaches of the provisions of the law relating to the premises. Consequently, the respondent was entitled to terminate the tenancy agreement. (paras 30, 32, 34 & 36)

D **(2)** The 'non-compliances' were capable of being 'regularised'. While the tenancy agreement may be null and void and thus unenforceable, the tenancy agreement *per se* was not illegal. It followed that the respondent should be estopped from relying on the deviation committed by the appellant to seek a refund of the rentals that it had paid. The respondent E was also precluded from seeking restitution pursuant to s. 66 of the Contracts Act 1950. The respondent must pay for the rentals due while in occupation of the premises and since the rentals had been paid, the respondent was not entitled to a refund of the rentals. It was an overkill for the appellant to having to refund the rentals to the respondent for non-compliance with the Street, Drainage and Building Act 1974. The F respondent should not be entitled to the refund of the rentals, save for the deposit it had paid to the appellant. (paras 38, 40-43, 46 & 47)

(3) As the respondent was entitled to terminate the tenancy agreement, the appellant's counterclaim was disallowed. (para 49)

G **Case(s) referred to:**

Bellajade Sdn Bhd v. CME Group Bhd & Anor [2015] 7 CLJ 343 HC ***(refd)***

Lee Nyan Hon & Brothers Sdn Bhd v. Metro Charm Sdn Bhd [2009] 6 CLJ 626 CA ***(refd)***

Liputan Simfoni Sdn Bhd v. Pembangunan Orkid Desa Sdn Bhd [2019] 1 CLJ 183 FC ***(refd)***

H *Merong Mahawangsa Sdn Bhd & Anor v. Dato' Shazryl Eskay Abdullah [2015] 8 CLJ 212 FC* ***(refd)***

Patel v. Mirza [2016] UKSC 42 ***(refd)***

Redha Resources Sdn Bhd v. Majlis Agama Islam Selangor & Ors [2020] 5 CLJ 715 CA ***(refd)***

Singma Sawmill Co Sdn Bhd v. Asian Holdings (Industrialised Buildings) Sdn Bhd [1979] CLJU 96; [1979] 1 LNS 96 FC ***(refd)***

I *Soh Eng Keng v. Lim Chin Wah [1979] CLJU 98; [1979] 1 LNS 98 HC* ***(refd)***

Legislation referred to:
Contracts Act 1950, ss. 10(1), 24(a), (b), (e), 66
Street, Drainage and Building Act 1974, s. 70(1), (13), (16), 73(3), 79(1), (2)

For the appellant - Phang Soon Mun & Darren Ee; M/s Han & Partners
For the respondent - Low Yu Keen; M/s Desmond Chan & Jeff Law

Reported by S Barathi

JUDGMENT

Choong Yeow Choy JC:

Introduction

[1] The aphorism "you can't have your cake and eat it" may not make sense when one reads the adage literally. However, the appellant in the present appeal will argue that this maxim makes perfect sense and should apply to the respondent.

[2] At the Sessions Court, the dispute between the parties centred on a tenancy agreement based on a letter of offer. The appellant (defendant in the Sessions Court) was the landlord whilst the respondent (plaintiff in the Sessions Court) was the tenant. The respondent had argued that the tenancy based of a letter of offer had contravened various provisions of the Street, Drainage and Building Act 1974 and thus, was void on the ground of illegality. Henceforth, it claimed that it was entitled to the refund of the rentals that it had paid to the appellant amounting to RM332,684.40.

[3] This is where the above axiom comes in, as far as the appellant was concerned. This is owing to the fact that, notwithstanding the supposed breaches of the provisions of the law, the respondent had occupied the premises, carried out its business for a period of over fifteen months and yet demanded that rentals the respondent had paid be refunded.

[4] In this appeal, the appellant is appealing against the entire decision of the learned Sessions Court Judge in allowing the respondent's claims with costs of RM30,000 and interests of 5% per annum from the date of the commencement of the action and in dismissing its counterclaim.

The Overarching Issues

[5] The principal issue for consideration in this appeal is whether the learned Sessions Court Judge was right in allowing the respondent's claims and in dismissing the appellant's counterclaim.

[6] The questions/issues couched before the Sessions Court, as outlined by the learned Sessions Court Judge at para. 21 of his grounds of judgment are as follows:

(i) whether the plaintiff is entitled to a declaration that the agreement is null and void?;

(ii) whether the plaintiff is entitled for a refund of RM332,684.40 being payments that have been made to the defendant for the premises?;

(iii) whether the defendant is entitled to counterclaim for RM262,959.17 being the alleged outstanding rental and charges for the premises?; and

(iv) whether the defendant is entitled to damages to be assessed by the court for loss of rental for unexpired term of the tenancy and reinstatement cost?

The Parties And Background Facts

[7] The respondent (plaintiff in the Sessions Court), Hatching Education Group Sdn Bhd, is a company that runs a business related to education.

[8] The appellant (defendant in the Sessions Court), Tetap Tiara Sdn Bhd, is the developer of a commercial project known as Jaya One, in Petaling Jaya, Selangor. (Initially, Jaya One Management Corporation was named as the second defendant but the suit against this second defendant had been withdrawn.)

[9] Pursuant to a letter of offer dated 5 December 2017, the appellant and respondent had entered into a tenancy agreement whereby the appellant had agreed to rent the two premises known as 100-1.027, 100-1.029, 100-U1.025, 100-U1.027 & 100-U1.029, Level 1 & U1, The School, Jaya One, for three years beginning from 1 January, 2018 until 31 December 2020 to the respondent.

[10] The combined monthly rental was RM35,000 (RM22,000 for the Level U1 premises and RM13,000 for the Level 1 premises).

[11] The respondent accepted the tenancy of the premises on 8 December 2017, took vacant possession of Level U1 premises on 1 January 2018 (but claimed to never had been handed over vacant possession of the Level 1 premises) and had used the premises as a special needs education centre since 1 January 2018.

[12] The respondent had subsequently discovered that there were internal renovations done in the premises which have deviated from the original building plan without the approval from the local authority, that is, the Majlis Bandaraya Petaling Jaya ("MBPJ"). Accordingly, the respondent was unable to apply for trade licenses to operate its business at the premises. The respondent thereby terminated the agreement *vide* a letter dated 18 December 2018 on the grounds that the agreement was void for illegality and vacated the premises on 31 March 2019.

[13] On 15 March 2019, the respondent filed a suit in the Sessions Court and sought, amongst others, a declaration that the agreement is null and void and refund of RM332,684.40 being the rental payments that had been made to the appellant for the premises.

[14] Not to be outdone, the appellant counterclaimed for RM262,959.17, being alleged outstanding rental and charges for the premises, and damages to be assessed by the court for loss of rental for unexpired term of the tenancy and reinstatement cost.

[15] It should also be mentioned that the appellant had also filed an *ex parte* distress proceedings *via* Originating Summons No. BA-A45-17-03-2019 ("distress proceedings") against the respondent for alleged unpaid rental. The writ of distress was executed on 22 March 2019 resulting in the respondent's properties being seized by the court. However, by a consent order dated 17 May 2019, the parties agreed to stay the public auction of the respondent's properties seized under the distress proceedings pending disposal of the suit at the Sessions Court.

Proceedings Before And Decision Of The Sessions Court

[16] Proceedings at the Sessions Court proceeded over nine days of full trial. A total of six witnesses testified during the trial.

[17] The learned Sessions Court Judge answered the first question/issue in the affirmative. The reasonings of the learned Sessions Court Judge are explained in paras. [22] to [29] of his grounds of judgment. The statutory provisions and authorities that the learned Sessions Court Judge has relied on are, *inter alia*, ss. 10(1) and 24(a), (b) and (e) of the Contracts Act 1950, ss. 70(1), (13) and (16), 73(3) and 79(1) and (2) of the Street, Drainage and Building Act 1974 and cases such as *Merong Mahawangsa Sdn Bhd & Anor v. Dato Shazryl Eskay Abdullah* [2015] 8 CLJ 212; [2015] 5 AMAR 681; [2015] 5 MLJ 619; [2015] 5 MLRA 377, *Singma Sawmill Co Sdn Bhd v. Asian Holdings (Industrialised Buildings) Sdn Bhd* [1979] CLJU 96; [1979] 1 LNS 96; [1980] 1 MLJ 21; [1979] 1 MLRA 418 and *Lee Nyan Hon & Brothers Sdn Bhd v. Metro Charm Sdn Bhd* [2009] 6 CLJ 626; [2010] 1 AMR 501; [2009] 6 MLJ 1; [2009] 2 MLRA 593.

[18] The learned Sessions Court Judge also decided the second question/issue in favour of the respondent, holding that the respondent was entitled to the refund based on s. 66 of the Contracts Act 1950 and cases such as *Soh Eng Keng v. Lim Chin Wah* [1979] CLJU 98; [1979] 1 LNS 98; [1979]; [1979] 2 MLJ 91; MLRH 413 and *Bellajade Sdn Bhd v. CME Group Bhd & Anor* [2015] 7 CLJ 343; [2015] 5 AMR 806; [2015] MLJU 1880; [2015] MLRHU 530.

[19] The reasons for the dismissal of the appellant's counterclaim are explained in paras. [72] to [93] of the learned Sessions Court Judge's grounds of judgment.

A **The Parties' Contentions In This Appeal**

[20] The appellant had pivoted its arguments based on the clauses in the letter of offer. It relied primarily on cls. 2, 12, 15, 17 and 19 of the said letter of offer.

B **[21]** Clause 2 provides that no warranty is given by the intending landlord that the premises shall be fit for the purpose of special needs education centre operated by the respondent under the trade name of Hatching Centre.

[22] In support of its appeal, the appellant also drew support from cl. 12 as that relevant clause makes reference to the fact that the tenant, that is, the C respondent, agrees to take the premises on an "as is where is" basis.

[23] It was further pointed out that in cl. 15, the respondent, as tenant, has agreed, among others, to the appellant, as landlord, reserving the right to amend, alter, vary or change the specifications and building plans for the building or to carry out any construction or renovation works to the building D and that the appellant shall not be liable to the respondent for any damages, costs, losses or expenses incurred by the respondent as a result of such amendment, alteration, variation or changes.

[24] As for cl. 17, the contention by the appellant was that it shall be E entitled to terminate the tenancy and forfeit all the deposits paid under the agreement and claim for the loss of rental for unexpired terms of the tenancy and all costs and damages incurred, in the event the respondent failed to pay rent and/or monies under the tenancy, execute the agreement within the stipulated timeframes and/or failure to commence business at the premises. This clause is cited to support its counterclaim.

F **[25]** Finally, references were made to cl. 19, in particular:

(i) clause 19(c) whereby it has been agreed by the parties that the respondent shall at its own costs and expenses obtain relevant approvals and/or permits and/or licenses from the relevant authorities to operates G its business;

(ii) clause 19(d) whereby it has been agreed by the parties that the respondent shall be entitled to terminate the tenancy for the Level 1 premises only within six months from the date of the letter of offer in the event that the respondent is unable to procure the requisite permit, H license or approval for operation of its business from the relevant authorities; and

(iii) clause 19(j) whereby it has been agreed by the parties that on or before expiry or sooner determination of the term of the tenancy, the respondent shall peacefully re-deliver vacant possession of the demised I premises to the appellant in the original state and condition as when the demised premises was first handed over to the respondent, failing which the respondent shall be liable to pay double rental.

[26] More importantly, it was the appellant's submissions that after becoming aware of the "deviation" in April 2018, the respondent continued to occupy the premises and enjoyed the profits from its business until it moved out in March 2019. In short, the respondent did not terminate the tenancy within the given time limit and continued to operate its business and occupy the premises. The fact that the respondent did not terminate the tenancy despite having the right to do so pursuant to cl. 19(d) was admitted by the respondent.

[27] Another point made by the appellant is that the premises are not illegal and could be "regularised". In support of this contention, the appellant made reference to the testimony of the respondent's second witness, SP2, who is Majlis Bandaraya Petaling Jaya's officer. Expanding on this ground, the appellant further submitted that it was the respondent's responsibility to regularise the renovations.

[28] On the other hand, the respondent underscored the point that the renovation and illegal structures in the premises were in violation of the statutory provisions under the Street, Drainage and Building Act 1974 and this was confirmed by the appellant's own architect.

[29] Henceforth, based on the authorities mentioned in paras. [15] and [16] above, the respondent submitted that the learned Sessions Court Judge was correct in answering the questions that were before the Sessions Court.

Analyses Of The Legal Position And The Decision Of This Court

[30] Based on the totality of evidence before this court, this court is in agreement with the Sessions Court's finding that the agreement between the parties had breached the various provisions of the law.

[31] This court is of the considered view that cls. 2, 12 and 15 of the letter of offer do not in any way advance the appellant's case.

[32] The parties in a contract cannot, through an "agreement" or a "waiver", validate any non-compliance with the provisions of the law.

[33] However, cls. 19(c) and (d) of the letter of offer warrant more careful consideration. Under these clauses, obligations are imposed on the tenant.

[34] This court is mindful of the fact the respondent became aware of the "deviation" since April 2018 and continued to occupy the premises until March 2019 – running its business uninterrupted. Be that as it may, the continued occupation of running of the business do not detract from the fact that there were non-compliances/breaches of the provisions of the law relating to the premises.

[35] In view of the foregoing, this court is in agreement with the learned Sessions Court Judge that the answer to the first of the four questions raised is in the affirmative.

[36] The resulting consequence from the above is that the respondent was entitled to terminate the tenancy agreement. This is notwithstanding the existence of cl. 19(d) of the letter of offer.

[37] Question/issue 2, that is, whether the plaintiff is entitled for a refund of RM332,684.40 being payments that have been made to the to the defendant for the premises requires additional in-depth analysis and consideration.

[38] This court is in agreement with the argument advanced by the appellant that the "non-compliances" were capable of being "regularised".

[39] In the Court of Appeal case of *Redha Resources Sdn Bhd v. Majlis Agama Islam Selangor & Ors* [2020] 5 CLJ 715; [2020] AMEJ 0276; [2020] 6 MLJ 541; [2020] 5 MLRA 398, the plaintiff was not allowed to rely on the argument that the buildings were illegally constructed as they failed to act on that alleged breach. There is a parallel to be drawn between that case and the present appeal in that the respondent in this instant appeal had failed to act on the infraction by the landlord appellant but continued to occupy the premises and carry out its business.

[40] A crucial aspect in the present appeal is the fact that the while the tenancy agreement may be null and void and thus unenforceable, the tenancy agreement *per se* is not illegal.

[41] It follows that the respondent in the present appeal should be estopped from relying on the deviation committed by the appellant to seek a refund of the rentals that it had paid.

[42] This court also is also of the considered view that the respondent is precluded from seeking restitution pursuant to s. 66 of the Contracts Act 1950. That relevant section provides as follows:

> Obligation of person who has received advantage under void agreement, or contract that becomes void
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> 66. When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under the agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it.
>
> ILLUSTRATIONS
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> (a) A pays B RM1,000 in consideration of B's promising to marry C, A's daughter. C is dead at the time of the promise. The agreement is void, but B must repay A the RM1,000.
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> (b) A contracts with B to deliver to him 250 gantangs of rice before the 1st of May. A delivers 130 gantangs only before that day, and none later. B retains the 130 gantangs after the 1st of May. He is bound to pay A for them.

(c) A, a singer, contracts with B, the manager of a theatre, to sing at his theatre for two nights in every week during the next two months, and B engages to pay her RM100 for each night's performance. On the sixth night A wilfully absents herself from the theatre, and B, in consequence, rescinds the contract. B must pay A for the five nights on which she had sung.

[43] While the appellant may have received the rentals and thus had received an advantage, so too has the respondent. The respondent, like B in both Illustrations (b) and (c) of s. 66, must pay for the rentals due while in occupation of the premises. Since these rentals have been paid, the respondent is not entitled to a refund of these rentals.

[44] It is apposite that we remind ourselves of the following observations by the Federal Court in *Liputan Simfoni Sdn Bhd v. Pembangunan Orkid Desa Sdn Bhd* [2019] 1 CLJ 183; [2019] 4 MLJ 141; [2018] MLRAU 484 ("*Liputan Simfoni*") – on the danger of "overkill" – if this court were to answer question/issue 2 in the affirmative. This case was not cited by either party in the present appeal but the principle discussed is most pertinent. Hasan Lah FCJ alluded to this principle at paras. [115] to [117] in the said judgment.

[45] The transgressions in *Liputan Simfoni* were in the form of an attempt to side-step compliance with the Stamp Act 1949 and the Real Property Gains Tax 1976. The Federal Court was nevertheless of the view that the first defendant's infringement of the two Acts did not prevent it from suing on the contract which is legal. Applying the trio of considerations test as laid down by Lord Toulson in *Patel v. Mirza* [2016] UKSC 42, the Federal Court held that "it is an overkill for the first defendant to lose the subject land for the infringement of the two Acts which is punishable by a fine upon conviction."

[46] Likewise, it is an overkill for the appellant to having to refund the rentals to the respondent for non-compliance with the Street, Drainage and Building Act 1974.

[47] The respondent should not be entitled to the refund of the rentals, save for the deposit it had paid to the appellant.

[48] On questions/issues 3 and 4, this court is in agreement with the decision of the Sessions Court is disallowing the appellant's counterclaim.

[49] The overriding reason as to why the counterclaim should be disallowed is based on the fact that the respondent was entitled to terminate the tenancy agreement.

[50] As the decision of the Sessions Court is allowed in part, I make no order as to costs.